

CASE NO. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**INTERNATIONAL UNION OF OPERATION ENGINEERS LOCAL 501,
AFL-CIO,**

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

**ON APPEAL FROM NATIONAL LABOR RELATIONS BOARD
CASE NO. 367 NLRB NO. 62, CASES 28-CA-225263**

**PETITION FOR REVIEW OF INTERNATIONAL UNION OF
OPERATING ENGINEERS LOCAL 501, AFL-CIO**

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Attorneys for Petitioner, **INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 501, AFL-CIO**

International Union of Operating Engineers Local 501, AFL-CIO hereby petitions for review from the Board Decision and Order of the National Labor Relations Board, entitled *NP Sunset LLC d/b/a Sunset Station Hotel Casino and International Union of Operating Engineers Local 501, AFL-CIO*, issued as Case 367 NLRB No. 62. A copy of the Board's Decision and Order is attached as Exhibit A.

Dated: January 10, 2019

Respectfully Submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: /s/ DAVID A. ROSENFELD
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Attorneys for Petitioner
INTERNATIONAL UNION OF
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EXHIBIT A

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**NP Sunset LLC d/b/a Sunset Station Hotel Casino and
International Union of Operating Engineers Local 501, AFL-CIO. Case 28-CA-225263**

January 7, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN
AND KAPLAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on August 9, 2018, by International Union of Operating Engineers Local 501, AFL-CIO (the Union), the General Counsel issued the complaint on August 27, 2018, alleging that NP Sunset LLC d/b/a Sunset Station Hotel Casino (the Respondent) violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain with it and to furnish relevant information, following the Union's certification in Case 28-RC-222992. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses.

On September 12, 2018, the General Counsel filed a Motion for Summary Judgment. On September 17, 2018, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted.¹ The Respondent filed a response, and the Union filed a Joinder in Motion for Summary Judgment and Request for Remedies.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain and to furnish requested information, but contests the validity of the Union's certification on the basis of its contention, raised and rejected in the underlying representation proceeding, that the unit is not appropriate.² In addition, the Respondent asserts that it has raised issues of material fact by

denying that the requested information is necessary and relevant to the Union's role as bargaining representative.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

We also find that there are no factual issues warranting a hearing with respect to the Respondent's refusal to furnish the Union with requested information. The complaint alleges, and the Respondent admits, that about July 26, 2018, the Union requested in writing that the Respondent furnish it with the following information:

1. A list of current employees including their names, dates of hire, rates of pay, job classification, last known address, phone number, date of completion of any probationary period, and Social Security number.
2. A copy of all current company personnel policies, practices or procedures.
3. A statement and description of all company personnel policies, practices or procedures other than those mentioned in Number 2 above.
4. A copy of all company fringe benefit plans including pension, profit sharing, severance, stock incentive, vacation, health and welfare, apprenticeship, training, legal services, child care or any other plans which relate to the employees.
5. Copies of all current job descriptions.
6. Copies of any company wage or salary plans.
7. Copies of all disciplinary notices, warnings or records of disciplinary personnel actions for the last year. A copy of all witness statements for any such discipline.
8. A statement and description of all wage and salary plans which are not provided under number 6 above.

The complaint further alleges, and the Respondent admits, that since about July 27, 2018, the Respondent has failed and refused to furnish the information requested by the Union.

It is well established that information concerning the terms and conditions of employment of unit employees is

¹ The General Counsel's motion requests that the Board find that the Respondent has violated the Act "as alleged in paragraph 6(e) of the complaint." This appears to be an inadvertent error, as there is no par. "6(e)" in the complaint. There is, however, a par. 6 in the complaint, and it alleges that by its conduct, the Respondent violated the Act.

Accordingly, we construe the General Counsel's motion as seeking a finding that the Respondent violated the Act as alleged in complaint par. 6.

² The Respondent raises the unit issue in both its denial of complaint par. 5(a) and in its affirmative defenses.

presumptively relevant for purposes of collective bargaining and must be furnished on request.³ See, e.g., *Metro Health Foundation, Inc.*, 338 NLRB 802, 803 (2002). Specifically, with the exception of the request for employee Social Security numbers,⁴ the information requested by the Union as to unit employees is presumptively relevant for purposes of collective bargaining, and the Respondent has not asserted any basis for rebutting the presumption. See, e.g., *CVS*, 364 NLRB No. 122, slip op. at 1 (2016), enfd. mem. 709 Fed.Appx. 10 (D.C. Cir. 2017) (per curiam); *Metro Health Foundation*, supra.⁵

Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a limited liability company with an office and place of business in Henderson, Nevada (the Respondent's facility), and has been engaged in operating a hotel casino. During the 12-month period ending August 9, 2018, the Respondent, in conducting its operations described above, purchased and received at its facility goods valued in excess of \$50,000 directly from points outside the State of Nevada, and derived gross revenues in excess of \$500,000.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

³ The Union stated in its request that it sought the information "for bargaining for the bargaining unit." Although the complaint does not specifically state that the information request was limited to unit employees, we find, in agreement with the Respondent, that it should be so construed. See, e.g., *Freyco Trucking, Inc.*, 338 NLRB 774, 775 fn. 1 (2003) (request for "copy of all payroll records" construed as pertaining to unit employees, even though request not described in those specific terms).

⁴ The Board has held that employee Social Security numbers are not presumptively relevant and that the requesting union must demonstrate the relevance of such information. *Maple View Manor*, 320 NLRB 1149, 1151 fn. 2 (1996), enfd. mem. 107 F.3d 923 (D.C. Cir. 1997) (per curiam). Here, the Union's request did not specify why it wanted this information, and the Union has not otherwise demonstrated its relevance. See *Pallet Cos.*, 361 NLRB 339, 340 fn. 4 (2014), enfd. mem. 634 Fed.Appx. 800 (D.C. Cir. 2015) (per curiam). We therefore deny summary judgment as to this item and remand this issue to the Region for further appropriate action.

⁵ With respect to the Union's request for copies of witness statements in disciplinary matters, the Respondent does not contend there is a confidentiality interest weighing against disclosure of such statements or, indeed, raise any particularized defense, including that the applicable standard should be changed. See *Piedmont Gardens*, 362 NLRB No. 139 (2015) (overruling *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978), under

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on July 19, 2018, the Union was certified on August 1, 2018, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time slot technicians, utility technicians, and slot mechanics employed by the Employer at its facility in Henderson, Nevada; excluding all other employees, office clerical employees, professional employees, and guards and supervisors as defined by the National Labor Relations Act.

The Union continues to be the exclusive collective-bargaining representative of unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

At all material times, Valerie Murzl has been an agent of the Respondent within the meaning of Section 2(13) of the Act.⁶

About July 26, 2018, the Union requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit employees, and since about July 27, 2018, the Respondent has failed and refused to recognize and bargain with the Union.

About July 26, 2018, the Union requested that the Respondent furnish it with the information described above, and since about July 27, 2018, the Respondent has failed and refused to furnish the requested information. With the exception of Social Security numbers, the requested information for unit employees is necessary for and relevant to

which witness statements were exempt from disclosure, and holding that witness statements must be furnished on request unless employer establishes legitimate and substantial confidentiality interest that outweighs the union's need for the statements), affd. on other grounds 858 F.3d 612 (D.C. Cir. 2017). Chairman Ring and Member Kaplan apply *Piedmont Gardens* here as extant precedent absent any request to reconsider it.

With respect to the Union's request for wage or salary plans of unit employees, we note that, in its response to the Notice to Show Cause, the Respondent refers to this information as confidential but provides no explanation or argument in support. It is well settled that the mere assertion of confidentiality does not, by itself, raise a material issue of fact warranting consideration. E.g., *Mission Foods*, 345 NLRB 788, 792 (2005) (summary judgment granted where "[r]espondent . . . only asserted a blanket claim of confidentiality, and [did] not establish[] why particular information would trigger specific confidentiality concerns"); see also *Bud Antle, Inc.*, 359 NLRB 1257, 1265 (2013) (claim of confidentiality rejected when no evidence offered in support), reaffirmed and incorporated by reference 361 NLRB 873 (2014).

⁶ Although the Respondent denies the complaint allegation that Valerie Murzl has held the position of corporate vice president of human resources and is a supervisor within the meaning Sec. 2(11) of the Act, it admits that Murzl is an agent within the meaning Sec. 2(13) of the Act.

the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.

We find that, with the exception of the failure and refusal to furnish Social Security numbers, these failures and refusals constitute an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since July 27, 2018, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, and by failing and refusing since July 27, 2018, to furnish the Union with requested information that is necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the Respondent's unit employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order the Respondent to cease and desist from such conduct. In addition, we shall order the Respondent to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement. We shall also order the Respondent to furnish the Union with the information it requested on July 26, 2018, with the exception of employee Social Security numbers.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord: *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964).

The Union requests additional enhanced remedies. Contrary to the Union's assertion, there has been no showing that the Board's traditional remedies are insufficient to redress the violations found. Accordingly, we deny the Union's request for additional remedies.

The Union also requests a broad order requiring the Respondent to cease and desist from violating the Act "in any other manner." A broad order is appropriate when a respondent has been shown either to "have a proclivity to

violate the Act" or to have "engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods*, 242 NLRB 1357, 1357 (1979). We find that a broad order is not warranted in the circumstances here.

ORDER

The National Labor Relations Board orders that the Respondent, NP Sunset LLC d/b/a Sunset Station Hotel Casino, Henderson, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Union of Operating Engineers Local 501, AFL-CIO (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody that understanding in a signed agreement:

All full-time and regular part-time slot technicians, utility technicians, and slot mechanics employed by the Employer at its facility in Henderson, Nevada; excluding all other employees, office clerical employees, professional employees, and guards and supervisors as defined by the National Labor Relations Act.

(b) Furnish to the Union in a timely manner the information requested by the Union on about July 26, 2018, with the exception of employee Social Security numbers.

(c) Within 14 days after service by the Region, post at its Henderson, Nevada facility copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted.

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the

In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 27, 2018.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the General Counsel's Motion for Summary Judgment is denied with respect to the allegation concerning Social Security numbers in paragraph 5(f)(1) of the complaint, and that this allegation is remanded to the Regional Director for Region 28 for further appropriate action.

Dated, Washington, D.C. January 7, 2018

John F. Ring, Chairman

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with International Union of Operating Engineers Local 501, AFL-CIO (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody that understanding in a signed agreement:

All full-time and regular part-time slot technicians, utility technicians, and slot mechanics employed by the Employer at its facility in Henderson, Nevada; excluding all other employees, office clerical employees, professional employees, and guards and supervisors as defined by the National Labor Relations Act.

WE WILL furnish to the Union in a timely manner the information requested by the Union on July 26, 2018, with the exception of employee Social Security numbers.

NP SUNSET LLC D/B/A SUNSET STATION HOTEL
CASINO

The Board's decision can be found at <https://www.nlr.gov/case/28-CA-225263> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the withing action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501.

I certify that on January 10, 2019, the **PETITION FOR REVIEW OF INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 501, AFL-CIO** was served on all parties or their counsel of record by electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kkempler@unioncounsel.net to the email addresses set forth below:

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I certify that the above is true and correct. Executed at Alameda, California,
on January 10, 2019.

/s/ Karen Kempler
Karen Kempler